STATE OF MICHIGAN

IN THE SUPREME COURT

CHERYCE GREEN, as Personal Representative of the Estate of **KEIMER EASLEY**, deceased

Plaintiff-Appellee,

v.

A.P. PRODUCTS LIMITED, and REVLON CONSUMERS PRODUCTS CORPORATION,

Defendants-Appellants,

SUPER 7 BEAUTY SUPPLY, INC.,

Defendant.

Supreme Court No.: 127718
COA No: 249113
LC No.: 01-125094 NP

ORIGINAL

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

*** **ORAL ARGUMENT REQUESTED*****

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals Properly Reverse the Trial Court's Order granting Defendants' Motions for Summary Disposition pursuant to **MCR 2.116(C)(10)**?

Plaintiff-Appellee's Answer.....**Yes**

Defendants-Appellants' Answer .....**No**

Court of Appeals' Answer .....**Yes**

II. Did The Court of Appeals Properly Find that There Was a Question of Fact As to Whether The Defendants-Appellants Had a Duty to Warn?

Plaintiff-Appellee's Answer.....**Yes**

Defendants-Appellants' Answer .....**No**

Court of Appeals' Answer .....**Yes**

III. Did The Court of Appeals Use the Proper Standard to Find That The Defendants-Appellant's Duty to Warn Was Not Obviated By the Open and Obvious Doctrine?

Plaintiff-Appellee's Answer.....**Yes**

Defendants-Appellants' Answer .....**No**

Court of Appeals' Answer .....**Yes**

IV. Was The Hair Care Product at Issue A Simple Product to Which the Defendants-Appellants Owed No Duty to Warn?

Plaintiff-Appellee's Answer.....**No**

Defendants-Appellants' Answer .....**Yes**

Court of Appeals' Answer .....**No**

V. Was Plaintiff a Sophisticated User So As to Obviate the Defendants-Appellants' Duty to Adequately Warn?

Plaintiff-Appellee's Answer.....**No**

Defendants-Appellants' Answer .....**Yes**

Court of Appeals' Answer .....**No**

VI. Was The Alleged Misuse of the Product in Question Reasonably Foreseeable so As to Obviate Misuse as a Defense?

Plaintiff-Appellee's Answer.....**Yes**

Defendants-Appellants' Answer .....**No**

Court of Appeals' Answer .....**Yes**

VII. Does Plaintiff-Appellee's Duty as A Parent to Protect Her Child Does Obviate the Defendants-Appellees of Their Duty to Warn?

Plaintiff-Appellee's Answer.....**No**

Defendants-Appellants' Answer .....**Yes**

Court of Appeals' Answer .....**No**

VIII. Did Plaintiff Presented Sufficient Evidence to Create a Question of Fact Regarding Whether the Defendants' Negligence was a Proximate Cause of the Injury in Question?

Plaintiff-Appellee's Answer.....**Yes**

Defendants-Appellants' Answer .....**No**

Court of Appeals' Answer .....**Yes**

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STATEMENT OF BASIS OF JURISDICTION

This Honorable Court has jurisdiction over this matter pursuant to **MCR 7.301(2)** and the October 19, 2005, Order of this Court granting Defendant-Appellant's timely Application for Leave to Appeal from the Court of Appeals decision in **Green v A.P. Products, 264 Mich App 391; 691 NW2d 38 (2005). (Appendix p. 1b-2b).**

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STATEMENT OF FACTS

This is a wrongful death/product liability action arising out of the death of 11 month old Keimer Easley. On or about June 28, 1999, minor Keimer Easley ingested a significant amount of Ginseng Miracle Wonder 8 Oil, Hair and Body Mist-Captive which was manufactured, distributed, and sold by the Defendants. (**Appendix pp 4b-- 5b**). The hair and body oil did not have a child safety cap and contained no warnings of the products toxicity and that the product contained hydorcarbons which if ingested can be fatal. (**Appendix pp 4b–5b, paragraphs 9-12**). In fact, the product label suggested that the product contained natural oils including: Gin Gro Oil complex (Paraffin Oil, Tea Tree Oil, Kuki Nut Oil, Evening Primrose Oil, Avocado Oil, Coconut Oil, Wheat Germ Oil, Isoproply Myristate, Fragrance, Gin Gro Herbal Complex (Mi-Tieh-Hsng (Rosemary), Shu-Wei-Tsao (Sage), Bai-Zhi (Angelica Root), Gan-Cao (Licorice Root), I-Ye-Jen (Job's Tears), Cedar, Hyacincth, Clove, Lemon Balm, Chamomile, Carrot Oleo Resin, Azulene, Tocopheryl Acetate (Vitamin E), Retinyl Palmitate (Vitamin A), Cholecalciferol (Vitamin D). **(Appendix p 12b)**.

After ingesting the hair and body oil, Keimer Easley immediately began experiencing signs of respiratory problems in the form of coughing and gagging. (**Appendix p 5b, paragraph 15**) As a result he was immediately transported to Children's Hospital of Michigan where he was diagnosed with respiratory insufficiency due to aspiration pneumonitis of hydrocarbons. (**Appendix p 5b, paragraphs 16-18**). Despite treatment, Keimer Easley's condition deteriorated and he expired on July 30, 1999. (**Appendix p 5b, paragraph 19**). The cause of Keimer Easley's death was identified as multi system organ failure due to chemical pneumonitis caused by hydrocarbon ingestion. (**Appendix p 6b, paragraph 20**).

A wrongful death\product liability claim was filed in this matter alleging that the Defendant Manufacturers and Distributers A.P. Products and Revlon Consumers Products, and the sellers,

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Defendant Super 7 Beauty Supply, Inc. failed to properly warn of the products hazardous condition, failed to have an appropriate child proof cap, failed to produce a product safe for its use or foreseeable misuse, and breached implied warranties. (**Appendix pp 6b – 9b**). Defendants filed a Motion for Summary Disposition pursuant to **MCR 2.116(C)(10)**, asserting that Plaintiff could not establish causation in this matter and that no warranty existed in this case. Plaintiff opposed the Defendants' Motions. Following a hearing on May 21, 2003. Wayne County Circuit Court Judge, the Honorable Kaye Tertzag, granted Defendants Motions for Summary Disposition. **(Appendix pp 37a – 38a)**.

Plaintiff appealed by right the trial court's decision granting Defendants-Appellants' Motion for Summary Disposition to the Michigan Court of Appeals. Subsequently, following full briefing of the issues and oral argument, the Michigan Court of Appeals issued its opinion on November 23, 2004, reversing the trial court's decision and reinstating Plaintiff-Appellee's complaint. **Green v A.P. Products, 264 Mich App 391; 691 NW2d 38 (2005)**. In reaching its decision the Court of Appeals held:

1. That reasonable minds could differ as to whether the risk from ingesting Wonder 8 Oil would be obvious to a reasonable user. Thus, there was an insufficient basis upon which the Court could obviate the manufacturer of its duty to warn as a matter of law. **Id. at 402–403**.

2. That reasonable minds could differ as to whether Plaintiff would have used the product differently had a warning been present. Therefore, summary disposition based on causation would not have been appropriate. **Id. at 407**.

3. That Summary Disposition premised upon misuse was improper. **Id. at 410.**

4. That the Defendants are not absolved from a duty to warn based on parental duty, if a warning was required to put the Parent on notice of the dangers from which she was to take steps to protect her child. **Id. at 411.**

5. That the dismissal of Plaintiff's claims premised on a breach of implied warranties was in error. **Id. at 412.**

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Defendants-Appellants sought Leave from the Court of Appeals' decision in **Green, Id. supra**, asserting that the Court of Appeals' decision is essentially contrary to existing Michigan Law. This Honorable Court granted Defendant-Appellant's Application for Leave to Appeal and ordered the parties to brief the following issues: "**(1) whether the Court of Appeals erred in using a subjective rather than objective standard in its analysis of the open and obvious doctrine, (2) whether the Court of Appeals erred in concluding that the product at issue was not a 'simple product', (3) whether the Court of Appeals erred in failing to recognize plaintiff as a sophisticated user as defined by MCL 600.2945(j), and (4) whether aspiration of this product is a foreseeable misuse, and whether the material risk of the misuse is or should be obvious to a reasonably prudent product user.**" **(Appendix pp 1b-2b)**.

STANDARD OF REVIEW

This Court reviews de novo a Trial Court's decision to grant or deny a Motion for Summary Disposition. **Beaudrie v Henderson, 465 Mich 124, 129;631 NW2d 308 (2001).** In reviewing a Trial Court's decision regarding a Motion for Summary Disposition pursuant to **MCR 2.116(C)(10),** the Court must consider the entire record including the pleadings, affidavits, depositions, admissions and other documentary evidence. **See Fitch v State Farms, 211 Mich App 468, 470; 536 NW2d 273 (1995); Patterson v Kleiman, 447 Mich 429, 434; 526 NW2d 879 (1994), lv den, 448 Mich 1202 (1995).** Before summary disposition may be granted on grounds that no genuine issue as to any material facts exist, the Trial Court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. **See Meridian Mut. Ins. Co. v Hunt, 168 Mich App 672; 425 NW2d 111 (1988).** Specifically, under Michigan law, causation is a question of fact for the jury to decide except in cases where reasonable minds could not reach a different conclusion. **Brisboy v Fibreboard Corp., 429 Mich 540, 418 NW2d 650 (1988) (emphasis added).** Issues involving questions of statutory construction are questions of law, which are also reviewed **de novo**.

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Michigan Basic Property Ins. Ass'n v Ware 230 Mich App 44, 48; 583 NW2d 240 (1998);Daniels v Estate of Ware NW2d 32 (1999).

ARGUMENT

I. The Court of Appeals Properly Reversed the Trial Court's Order Granting Defendants' Motions for Summary Disposition Pursuant to MCR 2.116(C)(10)

A product liability action is "an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." **MCL 600.2945(h); MSA 27A.2945(h).** Production of a product is statutorily defined to include warnings, packaging or labeling. **MCL 600.2945(I); MSA 27A.2945.**

In the case at bar, the Plaintiff-Appellee's complaint alleges that the Defendants-Appellants breached their duty to warn of the risk of death posed by the product and breached the implied warranty thereby proximately causing the death of Keimer Easley. The Defendants-Appellants made several arguments as to why Plaintiff-Appellee's should have been dismissed. Each of Defendants-Appellants' arguments are untenable.

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A. The Court of Appeals Properly Found that There Was a Question of Fact As to Whether The Defendants-Appellants Had a Duty to Warn

Under Michigan law, a manufacturer or seller of a product has a duty to warn purchasers or users of dangers associated with the intended use or reasonably foreseeable misuse of a product. **Glittenberg v Doughboy Recreational Industries, 441 Mich 379; 491 NW2d 208 (1992).** A seller or manufacturer, however, has no duty to warn of open and obvious dangers. **Id. See also MCL 600.2948(2); MSA 27A.2948(2), Fischer v Johnson Milk Co., 383 Mich 158; 174 NW2d 752 (1970); Mack v General Motors Corp., 112 Mich App 158; 315 NW2d 561 (1982).** A seller or manufacturer also does not have a duty to warn of the potential dangerous conditions or characteristics of a simple product. **Glittenberg, supra at 384.**

1. The Court of Appeals Used the Proper Standard to Find That The Defendants-Appellant's Duty to Warn Was Not Obviated By the Open and Obvious Doctrine

The determination as to what is open and obvious is made on an objective basis and is not based on the Plaintiff's subjective knowledge. **Glittenberg, supra at 391-93.** Open and obvious dangers are conditions that create a risk of harm that "is visible, . . . is a well known danger, or . . . is discernable by casual inspection. Thus, one can not say that he did not know of a dangerous condition that was so obvious that it was apparent to those of ordinary intelligence." **Id. at 392 (citing 3 American Law Products Liability, 3d § 33.26 p. 56.)** When a Defendant raises open and obvious as a defense against a failure to warn claim "[t]he court must determine whether reasonable minds could differ with respect to whether the danger is open and obvious. . . . . If the Court determines that reasonable minds could differ, the obviousness of the risk must be determined by the Jury. **Glittenberg, supra at 398-99.**

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Contrary to the Defendant-Appellant's assertion, the language of the Court of Appeals opinion in **Green** belies any suggestion that the Court of Appeals used a subjective standard. In the case at bar, the Court of Appeals held that

> [t]he risk of possibly becoming ill from the ingestion of the hair and body care product would probably be obvious to a **reasonably prudent product user** and would likely be a matter of **common knowledge to persons n the same or similar position as plaintiff**. We can not conclude, however, that as a matter of law, the risk of death from the ingestion of Wonder 8 Oil **would be obvious to a reasonably prudent product user and be a matter of common knowledge**, especially considering the lack of any relevant warning. . . . Indeed, the reference to natural oils, such as coconut and wheat germ oil, as listed on the bottle of Wonder 8 Oil, could lead a reasonable person to conclude that there was little chance, if any, that ingestion would lead to serious ill effects, let alone death. . . .Even if a reasonable person would be conscious of possible harm or of a vague danger associated with the product, it does not "preclude a jury from finding that a warning was nonetheless required to give [the purchaser] a full appreciation of the seriousness of the life-threatening risks involved. **Green, supra at 401-402.**

The Court of Appeals not only utilized the objective "reasonably prudent person" standard to reach it's decision, but ruled in a manner, which was consistent with existing case law in interpreting the "open and obvious" standard and how it was to be applied.

In **Hollister v Dayton Hudson Corporation, 201 F3d 731 (2000)**, the Sixth Circuit Court of Appeals, applying Michigan Law, found that summary disposition was inappropriate because reasonable minds could differ as to the obviousness of the risk posed by the product. **Id. at 741**. In **Hollister**, Plaintiff was injured when a shirt manufactured and sold by the Defendant caught fire. The Court found that although a reasonable person might be expected to know that clothing is flammable, an ordinary consumer would have had no way of knowing that a particular shirt was substantially more combustible. As such, the issue was one for the jury to decide and summary disposition was improper. **Id.**

Similarly, in **Michigan Mutual Insurance Company v Heatilator Fireplace, 422 Mich 148: 366 NW2d 202 (1985)** this Court held that as a matter of law, the risk of causing a fire posed by a product user obstructing a fireplace's heat vent was not open and obvious. **Id. at 153**. While

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the court found that it was undisputed that the Plaintiff knew the vents should not be blocked, there was testimony that the Plaintiff believed the obstruction would limit the airflow necessary for the fireplace to serve its room-heating purpose. **Id.** The Court went on to state that "[e]ven if it is arguable that [plaintiff's] testimony established consciousness on his part of a vague danger, it would not preclude a jury from finding that a warning was nonethelsss required to give him a full appreciation of the seriousness of the life-threatening risks involved." **Id. at 154**

In the case at bar, the Court of Appeals properly held that reasonable minds could differ as to whether the danger posed by the Wonder 8 Oil, death from ingestion of hydrocarbons contained in the product, was open and obvious to a reasonably prudent product user. As in **Hollister** and **Michigan Mutual**, while this is not a product that one would want their child to drink or even taste due to a vague risk of injury in the form of nausea, vomiting, or stomach upset, the products extreme toxicity and fatal consequences if ingested would not be considered or understood by the average purchaser of the product. This is especially true where the label does not identify the presence of hydrocarbons in the product and the product label provides a "recipe" of all natural ingredients.[1] **(Appendix p 12b).**

Thus, it is clear that the Court of Appeals utilized the objective "reasonably prudent person" standard and found that reasonable minds could differ as to whether the risk of death posed by the hair care product at issue was open and obvious. The Court of Appeals utilized the appropriate standard in reaching its decision which was fully supported by case law.

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[1] The product label identifies the following ingredients: Gin Gro Oil complex (Paraffin Oil, Tea Tree Oil, Kuki Nut Oil, Evening Primrose Oil, Avocado Oil, Coconut Oil, Wheat Germ Oil, Isoproply Myristate, Fragrance, Gin Gro Herbal Complex (Mi-Tieh-Hsng (Rosemary), Shu-Wei-Tsao (Sage), Bai-Zhi (Angelica Root), Gan-Cao (Licorice Root), I-Ye-Jen (Job's Tears), Cedar, Hyacincth, Clove, Lemon Balm, Chamomile, Carrot Oleo Resin, Azulene, Tocopheryl Acetate (Vitamin E), Retinyl Palmitate (Vitamin A), Cholecalciferol (Vitamin D). **(Appendix p 12b)**.

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2. The Hair Care Product at Issue Was Not A Simple Product to Which the Defendants-Appellants Owed No Duty to Warn

Under Michigan law, a manufacturer and seller "of a simple product has no duty to warn of the product's potentially dangerous condition or characteristics that are readily apparent or visible upon casual inspection and reasonably expected to be recognized by the average user of ordinary intelligence." **Glittenberg v Doughboy Recreational Industries, 441 Mich 379, 385; 491 NW2d 208 (1992).** A simple product is "a product all of whose essential characteristics are fully apparent." **Id.**

In **Glittenberg,** the seminal case on the simple product doctrine, the Michigan Supreme Court found that the manufacturer of an above ground swimming pool owed no duty to warn as dangers posed by a shallow pool were obvious. In **Glittenberg,** the Plaintiffs suffered head injuries and paralysis as a result of diving head first into shallow water. **Glittenberg, supra at 385**. The Court's decision was based on its finding that "above ground pools are simple products. No one can mistake them for other than what they are (ie. large containers of water that sit on the ground, all characteristics and features of which are readily apparent or easily discernable upon casual inspection." **Id. at 399.** Because the danger, the shallow water, was readily observable on casual inspection and the risk of hitting the bottom obviously encompasses the risk of catastrophic injury, the manufacturer had no duty to warn. **Id. at 400**.

The Court of Appeals in the case at bar properly found that the hair care product at issue was not a simple product. The only information the average product user has as to the content of the hair care product is the information provided to the consumer on the packaging label. The label on the product at issue in this case identified the contents as being "all natural." (**Appendix p 12 b**). In deed, the labeling listed various natural oils from edible fruits and vegetables including coconut, avocado, and wheat germ. (**Appendix p 12b**). Nothing on the labeling of this product identified the

presence of hydrocarbons or any item which is widely recognized as being potentially toxic or lethal. (**Appendix p 12b**). Thus, unlike in **Glittenberg,** the characteristics of the product were not fully apparent and were not visible or apparent upon casual inspection.[2] As such, the hair care product at issue was not a simple product.

3. Plaintiff was Not a Sophisticated User So As to Obviate the Defendants-Appellants' Duty to Adequately Warn

Pursuant to **MCL 600.2974(4);MSA 27A.2974(4)**:

> Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user.

The term sophisticated user is defined by statute as:

> [A] person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user. **MCL 600.2945(j); MSA 27A.2945(j).**

In the case at bar, the Court of Appeals properly held that there was no evidence presented that suggested Plaintiff was a sophisticated user. **Green**, **supra at 404, n 7**. The record was devoid of any such evidence for two reasons: First, the Defendants never raised the issue that Plaintiff was a sophisticated user. Second, Plaintiff was not a sophisticated user. No evidence in the record suggests that Plaintiff should generally be expected to have knowledge about Wonder 8 Oil's properties, including a potential hazard or adverse effect. If a consumer can be deemed a

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[2] Mrs. Green testified that she routinely read product Labels because she had small children and based on her review of the product label in the case at bar had no knowledge that this product could be toxic or fatal. (**Appendix pp. 14b, ¶¶ 3,6**).

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sophisticated user merely by propr use of similar products. Everyone would qualify as a sophisticated user.

Plaintiff Cheryce Green was a high school graduate who went on to become a certified nursing assistant who regularly worked in a nursing home. **(Appendix p 25b)** She was not a chemist. She was not employed or in anyway involved in the development or manufacturing of hair care products. She did not work at a poison control center. Plaintiff, Cheryce Green's only understanding of the content/properties of the product came from the label, which listed the "recipe" for the "all natural" product. **(Appendix p 12b)** There is nothing in her background, education, or experience that would suggest that she would or should generally be expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect.

B. <u>The Alleged Misuse of the Product in Question Was Reasonably Foreseeable so As to Obviate Misuse as a Defense</u>.

Defendant claims that it is entitled to summary disposition because the claimed harm to Plaintiff's decedent was caused by misuse of the product that was not reasonably foreseeable. Pursuant to **MCL 600.2947; MSA 27A.2947** a manufacturer remains liable for misuse of the product if the misuse is reasonably foreseeable. Defendants claim that the 11 month old Plaintiff's decedent's ingestion of the subject product can only reasonably be considered to be an unforeseen product misuse. This argument fails on two levels:

First, Keimer Easley was 11 months old at the time of this incident. Therefore, comparative negligence may not be assessed against him. His "misuse" of the product cannot be attributable to him.

The issue then becomes whether or not it is reasonably foreseeable that a liquid substance, bearing absolutely no warnings regarding its dangers, toxicity and potential lethalness may be left out in a home where anyone, including a child, could have access to the product and ingest it. It is

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reasonably foreseeable, given the products purpose that it would be left out where children may have access to it as it is labeled and marketed as a hair and body oil.

Second, even the Defendants' agent, Terrance Nolan testified that unscrewing the cap of the subject product and using it by pouring it on to the hands is foreseeable. The product is a hair and skin moisturizer. (**Appendix pp 16b–17b**). Although the product is designed to be applied through a pump, you can take the cap off and pour the product out. (**Appendix pp 76b–77b**). He further admitted that the label of the product does not contain any statements or warnings that the product was harmful if swallowed or fatal if swallowed. He also agreed that there was no labeling or warning on this product that says to **"keep out of the reach of children". (Appendix p77b.)**

It is axiomatic that a product that is liquid and that is marketed as a hair and body moisturizer could be used without the spray cap. This is especially true in circumstances where the spray pump malfunctions of the fluid level goes down to such a degree that the spray pump does not work effectively. Further, given its labeling, the contents listed in the "recipe", its color and consistency, it is reasonably foreseeable that the end user may leave this product out in the open in their home, specifically their bedroom or bathroom for use. Thus, having the product out in a location where a child may have access to it was reasonably foreseeable to the defendants. Given its lethal propensities if ingested, the defendant breached its duty by failing to provide appropriate warnings to alert the end user to the product's hazards.

Plaintiff Counsel has three comparison products, two of which are oils for body and scalp and the third is a body splash for moisturizing. All three of the products carry with it a very simple warning: "**Keep out of the reach of children**." In fact, the Bath and Body Works manufactured product entitled Sea Spray Body Splash with Moisturizing Aloe Vera which is manufactured in a similar container, with a similar consistency and color to the subject product contains the following cautions on its label:

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> **"Caution: for adult use only. Do not ingest. Keep out of the reach of children. . . .**

It is significant that this product, contained in the same type of bottle, with the same application dispenser has warnings. which according to Cheryce Green's Affidavit would have caused her to lock up the product. (**Appendix p 14b**) It is significant because the Sea Spray product does not have any "oils" in it. Specifically it does not have paraffin oil/mineral oil, which is a hydrocarbon, which is contained in the subject product and was the cause of Plaintiff decedent's death.

C. Plaintiff-Appellee's Duty as A Parent to Protect Her Child Does not Obviate the Defendants-Appellees of Their Duty to Warn.

In order for a parent to take appropriate and reasonable steps to protect their children, the parent must be adequately advised as to the risk posed by the product. In **Adams v Perry Furniture Co. (On Remand), 198 Mich App 1; 497 NW2d 514 (1993)** the Court of Appeals stated:

> Notwithstanding Bic's acknowledgment that it was foreseeable at the time the lighter was manufactured that lighters could get into and were getting into the hands of children, the typical user of a lighter is an adult. The flame from a lighter creates a risk of hare that is well known and discernable by casual inspection. We find the Bic has no duty to warn children with respect to the obvious danger of its lighters because such danger in no danger to the reasonably careful person. Bic fulfills its duty to warn by warning the adult purchasers of its products to keep the lighters out of the reach of children. Because reasonable minds can not differ with regard to the obvious character of the lighters dangers, Bic as a matter of law owes not duty to warn.

Id. at 13 (citation omitted).

In the case at bar, while the product in question was marketed for adult use, there **is** a question as to whether the risk posed by the product was open and obvious. **See argument supra.** Additionally, unlike Bic the Defendants-Appellants had no warning on its label that parents should "Keep out of reach of Children." Thus, the Defendants can not assert that their duty to warn is

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obviated in light of a general parental duty to protect. The Defendants-Appellants have a duty to warn the parent of the risk, because absent an understanding of the risk posed by the product, the parent is not in a position to take adequate and reasonable steps to protect their child.

D. Plaintiff Presented Sufficient Evidence to Create a Question of Fact Regarding Whether the Defendants' Negligence was a Proximate Cause of the Injury in question

It is plaintiff's position that the subject product was defective, and therefore the defendant breached it's implied warranty of merchantability as the product required a warning regarding its toxicity. The defendants failed to have any warnings regarding the product's toxicity and that defect caused the death of plaintiff's decedent.

Defendants asserted that they were entitled to summary disposition claiming plaintiff cannot supply the requisite evidence to prove proximate cause, i.e. the link between the lack of warning and the plaintiff decedent's death.

Case law regarding what establishes proximate cause in a failure to warn case is well settled. In **Mascarenas v Union Carbide, 196 Mich App 240, 251; 492 NW2d 512, 517 (1992)** the court stated:

> To establish a prima facie case that a manufacturer's breach of its duty to warn was a proximate cause of an injury sustained, plaintiff must present evidence that the product would have been used differently had the warnings been given.

Cheryce Green, the mother of the decedent, Keimer Easley testified in her deposition that she kept all of her nail supplies in a locked case (**Appendix p 49b**) because she knew they could be harmful if swallowed because she had read the warning labels. (**Appendix p 49b**). She also testified at her deposition that when her first son Devonte was born she got locks for the cabinets and plastic plugs for the electrical outlets to protect the baby from danger. (**Appendix pp 44b–45b**).

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The subject product was kept by her in the medicine cabinet which was not locked. She also permitted her young niece, Nichol Price, who was living in the house at the time to use the product. Additionally, her father and adult sister lived in the house and their various family members routinely visited them at the house.

Attached hereto is the Affidavit of Cheryce Green. **(Appendix pp 13b–14b)**. This Affidavit **supplements** her deposition testimony with respect to her knowledge, understanding and actions vis-a-vie this product. Her affidavit unequivocally states that if appropriate warnings regarding the toxicity of this product had been placed on the label, Ms. Green would have read the label and would rely upon the warnings as was her custom and habit. **(Appendix pp 13b–14b, paragraphs 1–3)**. Specifically, she avers in her affidavit that had appropriate warnings been given regarding this product's toxicity, she would have put the product in her locked nail polish case or in a cabinet with the child proof locks where she kept other products she knew were toxic. (**Appendix p 14b, paragraphs 4–5)**.

Specifically with regard to this product and its potential danger to her child, she testified in her deposition as follows:

> . . . but I never would have thought that that product would be dangerous." **(Appendix p 21b)**

Ms. Green's deposition testimony taken as a whole, together with her affidavit, unequivocally underscores that she is a conscientious mother who was safety conscious. In fact, on the evening of this incident, when she went upstairs to her room to program her TV, she put Keimer in his playpen, thus protecting him and insuring his safety. (**Appendix p 41b**). She specifically testified in her deposition that she did not know that the subject product was something that should not have been ingested until after her son drank it because after he drank it he started coughing. **(Appendix p 43b)**

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Cheryce Green had "child proofed" her home because of her sons Devonte and Keimer. Specifically, she testified that she did the following things to child proof her home to protect her children:

> **Q.** And what kinds of things did you do when you baby proofed your house?
>
> **A.** I have locks - - I had bought all the little locks for the cabinets. I bought the plastic plugs you plug in your plugs, and I kept anything that I can think of dangerous out of their way. **(Appendix pp 44b–45b)**

Thus it is axiomatic that had Cheryce Green been properly warned of the severe danger, toxicity and/or fatal consequences of this product, she would have used it differently. Thus, Plaintiff has established a prima facie case and summary disposition must be denied.

In **Hollister v Dayton Hudson Corporation, 201 F3rd 731 (1999)** the Court reversed the Trial Court's entry of Summary Judgment on Hollister's breach of implied warrant claim regarding failure to warn in a case where the parents of a consumer was severely burned when her shirt ignited upon contact with a hot stove burner claimed that the defendant was liable for failing to warn of the high flammability of a shirt. In that case, although the injured plaintiff had no memory of the incident, it was inferred that the shirt she was wearing caught on fire when she reached over the stove while cooking and her shirt tale came in contact with the burner on an electric stove. Hollister's mother stated in an affidavit that she would not have bought the shirt for her daughter if she had known that the shirt was extremely flammable, and Hollister herself maintained in an affidavit that she would not have worn the shirt in question if she had possessed such knowledge. Based upon the affidavits of Hollister and her mother, the court determined:

> A reasonable jury could find, based on this evidence, that the shirt's failure to carry a warning was a proximate cause of Hollister's injuries. **(Hollister, supra at 741-742)**

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Likewise, in this case, a reasonable jury can find, based upon plaintiff Cheryce Green's deposition testimony and affidavit that had the product in question carried a sufficient warning, plaintiff Cheryce Green would have locked up the product. Thus, the subject product's failure to carry a warning was a proximate cause of plaintiff decedent's death.

In **Hollister**, the court concluded that plaintiff established a prima facie case against **Dayton Hudson** for a breach of implied warranty based upon a failure to warn and that the district court erred in granting summary disposition on this claim. Furthermore, the court went on to distinguish between its reversal of the trial court's summary disposition and **Hollister's** likelihood of success at the time of trial. The court stated, despite its reversal of summary disposition:

> This is not to say, however that Hollister will necessarily prevail at trial. . . . She will also have to convince a jury that the lack of a warning on the shirt was a proximate cause of her injuries. . . . Finally, if Hollister does establish liability, the damages that Hollister sustained will be diminished in proportion to any amount of negligence attributed to her by the jury. . . . these hurdles are likely to be significant ones. We are convinced, however, that Hollister has the right to proceed to the next stage of the litigation. **Hollister, supra at 742-743.**

Similarly, in this case, while the Court cannot guarantee plaintiff herein will prevail at trial, it is for the jury to determine the amount, if any, of negligence attributable to her, she nevertheless is entitled to have a jury determine these issues. Therefore summary disposition should have been denied.

It is defendants' argument that the absence of appropriate warnings regarding this product was not the proximate cause of plaintiff decedent's untimely and tragic death. Defendant relies upon the deposition testimony of Cheryce Green by selectively taking excerpts of her testimony out of context. Cheryce Green's affidavit which supplements her deposition testimony, specifically addressing issues which were not asked by defense counsel during her deposition, at a minimum, creates a question of fact thereby precluding summary disposition. To the extent that the test for

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establishing a prima facie case that a manufacturer's breach of its duty to warn was a proximate cause of the injury sustained is evidence that the product would have been used differently had the warnings been given, involves the issues of motive and intent, summary disposition is precluded. **Lamoria v Health Care and Retirement Corp., 230 Mich App 801; 584 NW2d 589 (1998); Cavalier Manufacturing Company v Employers Insurance or Warsaw, 211 Mich App 330 (1995) and VanGuard Insurance Company v Bolt, 204 Mich App 271 (1994).**

Specifically, in **Lamoria, supra**, the court stated:

> Granting a motion for summary disposition is especially suspect where motive and intent are at issue or where the credibility of a witness or deponent is critical. **Lamoria, supra**

Cheryce Green's deposition testimony and affidavit specifically set forth her intent and motive with respect to protecting her children. Her use of child locks on cabinets, child proof plugs in electrical outlets, keeping her son in a playpen and keeping her nail polish products in a locked case are indicative of a safety conscious mother.

In order to grant summary disposition, this Court must conclude that plaintiff knew that her child would suffer irreparable harm if he had to access the product. This issue must be decided by a jury.

There is always a degree to the concept of harm. For example, if an 11 month old child swallowed an entire tube of tooth paste it would be harmful to the child by most likely making the child sick, necessitating a trip to the hospital and making the child uncomfortable and potentially having the child's stomach pumped. However, it is not reasonably foreseeable to the average prudent parent that ingesting a tube of tooth paste would cause the death of an 11 month old child. To that extent, and even in light of its potential harm if ingested, tooth paste is typically not something that is locked up in a house or a part of a "child proofing" program in a household. Tooth

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paste is used daily and therefore well within reach of children of all ages. Yet, it could be "harmful" if ingested.

Likewise, in this case, the extent of the harm to plaintiff decedent, i.e. death by hydrocarbon pneumonitis is not reasonably foreseeable to the average prudent user. While this is not a product that one would want their child to drink or even taste, its extreme toxicity and fatal consequences would not be considered or understood by the average purchaser of the product.

While Ms. Green may not have wanted her son to taste this product or put it in his mouth, she testified in her deposition that she did not allow him to even drink pop. She did not allow both occurrences because of the potential harm to an 11 month old child. Harmfulness can be measured in terms of degrees. It would be harmful to an 11 month old child to taste the subject product or put it in his mouth in the same manner as it would be harmful for an 11 month old child to drink pop which contains high quantities of sugar and caffeine.

In fact, the subject product's ingredients consist of natural oils. Plaintiff Cheryce Green testified in her deposition that she bought the product because it was advertised as having natural oils. The product is green in color and is referred to as "Ginseng" Oil. The ingredients listed include Gin Gro Oil complex (Paraffin Oil, Tea Tree Oil, Kuki Nut Oil, Evening Primrose Oil, Avocado Oil, Coconut Oil, Wheat Germ Oil, Isoproply Myristate, Fragrance, Gin Gro Herbal Complex (Mi-Tieh-Hsng (Rosemary), Shu-Wei-Tsao (Sage), Bai-Zhi (Angelica Root), Gan-Cao (Licorice Root), I-Ye-Jen (Job's Tears), Cedar, Hyacincth, Clove, Lemon Balm, Chamomile, Carrot Oleo Resin, Azulene, Tocopheryl Acetate (Vitamin E), Retinyl Palmitate (Vitamin A), Cholecalciferol (Vitamin D). (**Appendix p 12b**). All these "ingredients" which are listed as the product's " **recipe**" are all considered by the ordinary person to be "natural and/or health type products". In fact, many of these ingredients are food stuffs that are eaten such as kukui nut, avocado, coconut, wheat germ and herbs

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such as rosemary, sage, angelica root, jobes tears, hyacinth clove, lemon bomb, camellia, etc. Further, the product's recipe contains vitamins such as vitamin E, A and D. The use of the word "recipe" gives an inference that it's a natural healthy food product that contains natural, healthy ingredients.

These factors must be presented to a jury for ultimate determination of plaintiff's knowledge, intent and motive. Her motive and intent vis-a-vie the subject product is at issue. Her deposition and affidavit clearly provides insight into her motive and intent with respect to the subject product. She had no knowledge of its potential lethalness. Had she been given the appropriate warnings, she would have made sure that this product was locked away so that no one would have been able to leave it in a position that could cause harm to her children.

To the extent her credibility as a witness and her motive and intent with respect to the subject product are at issue, summary disposition must be denied.

In **VanGuard Insurance Company** v **Bolt**, the Court of Appeals held:

> "The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial. **Metropolitan Life Insurance Company v Reist, 167 Mich App 112, 121; 421 NW2d 592 (1988); Crossley v Allstate Insurance Company, 139 Mich App 464, 468; 362 NW2d 760 (1984)**. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent's credibility, there exist a genuine issue for the trier of fact and a motion for summary disposition should not be granted." **See Brown v Pointer, 390 Mich 346, 354; 212 NW2d 201 (1973); Metropolitan Life , supra. (VanGuard Insurance Company, supra at 767)**

Thus, the Court of Appeals in **VanGuard Insurance Company**, **supra** reversed the trial court's granting of summary disposition in favor of the defendant as defendant's motion was

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supported solely by the defendant's testimony at his deposition and the testimony of a witness. The Court stated:

> "Because of Bolt's testimony regarding his intent in striking Wargel is a credibility question, we are convinced that there exists a genuine issue of material fact to be decided at trial by the trier of fact. Accordingly, the circuit court errored in granting defendant's motion for summary disposition." **VanGuard Insurance Company, supra, at 276, 277**

In this case, viewing the evidence in a light most favorable to the non-moving party, the plaintiff's deposition testimony and the statements made in her affidavit unequivocally substantiate a prima facie case against the defendants thereby precluding summary disposition. At a minimum, to the extent that plaintiff, Cheryce Green's credibility, intent and motive with respect to her customs and habits of keeping potentially dangerous products away from her children, and her lack of knowledge and understanding about the subject product's dangerous propensities are at issue, in particular what she would have done had the defendant given proper warnings being the central issue in this case, a genuine issue of material fact has been created and thus summary disposition was improper.

It is well settled law in Michigan that proximate cause is usually a factual issue for the jury to determine. **Vsetula v Whitmyer, 187 Mich App 675; 468 NW2d 53 (1991).** Further, it is well settled law in Michigan that there may be more than one proximate cause for a plaintiff's damages. **Caldwell v Fox, 394 Mich 401; 231 NW2d 46 (1975)**. Plaintiff herein need not establish that the defendants' failure to warn was the sole cause of plaintiff decedent's death. In **Brisboy v Fire Board Corporation, 429 Mich 540; 418 NW2d 650 (1987)**, a wrongful death action against an insulation products manufacturer in connection with the lung cancer death of an asbestos worker who had smoked 2 packs of cigarettes a day for 30 years, the Supreme Court upheld a verdict in favor of

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the plaintiff on the issue of proximate cause in connection with a failure to warn claim and discussed the issue of multiple proximate cause as follows:

> "Liability does not attach unless an actor's negligent conduct is a proximate or legal cause of the harm suffered. The facts of this case illustrate the principle that there may be more then one proximate cause of injury. **Brackins v Olympia, Inc., 316 Mich 275, 25 NW2d 197 (1946)**. As this Court recognized in **McMillen v Vliet, 422 Mich 570, 577, 374 NW2d 679 (1985)**, "two causes frequently operate concurrently so that both constitute a direct proximate cause of the resulting harm." Thus, defendant cannot escape liability for its negligent conduct merely because the negligence of others may also have contributed to the harm caused. Consequently, it was sufficient for plaintiff to establish that Fire Board's negligence was a proximate cause of Rams injuries. . . ." **Brisboy, supra at 653**

Pursuant to **M CIV JI 15.03**, the definition of proximate cause includes the following: "there may be more than 1 proximate cause. To be a proximate cause, the claimed negligence need not be the only cause nor the last cause. A cause may be proximate although it and another cause act at the same time or in combination to produce the occurrence."

Therefore, summary disposition in the instant case is inappropriate as it is solely within the province of the jury to determine proximate cause in this case. Given the facts of this case, a jury reasonably can conclude that the defendants' negligent failure to warn was a substantial factor in plaintiff decedent's death. The assessment of the "comparative" negligence of Cheryce Green, if any, is also solely within the province of the jury.

RELIEF SOUGHT

Plaintiff-Appellee, Cheryce Green, as Personal Representative of the Estate of Keimer Easley, deceased, respectfully requests that this Honorable Court Deny Defendants-Appellees' Application for Leave to Appeal.

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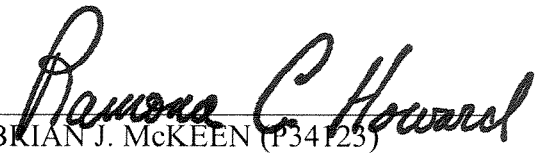
Respectfully Submitted,

McKEEN & ASSOCIATES, P.C.

BY: 

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